IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-688

CHICAGO TYPOGRAPHICAL UNION NO. 16,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

HAMMOND PUBLISHERS, INC.,
Intervenor.

BRIEF IN OPPOSITION TO GRANT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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Intervenor, Hammond Publishers, Inc., hereby files its opposition to granting the writ of certiorari in the above-captioned matter.

OPINIONS BELOW.

The Decision of Administrative Law Judge Jerry B. Stone (Pet. App. A1-A24) was entered July 10, 1974.

The Decision and Order of the National Labor Relations Board (Pet. App. A25-A43), reported at 216 NLRB 903 was entered on March 6, 1975.

The Judgment, without opinion, of the Court of Appeals for the District of Columbia (Pet. App. A44) was entered on June 21, 1976. An Order of said Court of Appeals (Pet. App. A45) denying rehearing was entered on August 18, 1976.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Does a labor organization violate Section 8(b)(1)(B) of the Labor-Management Relations Act, Title 29, United States Code, Section 158, by disciplining supervisor members for crossing a picket line to perform supervisory functions (including grievance adjustment)?

2. Is it an unconstitutional interpretation and application of the Labor-Management Relations Act to hold that a labor organization may not discipline a member who is a supervisor within the meaning of the Act for crossing a picket line to perform supervisory functions (including grievance adjustment)?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Constitution of the United States, Amendment I:

> Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble. . . .

Title 29, United States Code, Section 158(b)(1)(B):

> It shall be an unfair labor practice for a labor organization or its agents to restrain or coerce . . . an employer in the selection of his representative for the purposes of collective bargaining or the adjustment of grievances. . . .

Title 29, United States Code, Section 164(a):

> Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

COUNTERSTATEMENT OF THE CASE.

The Intervenor herein, Hammond Publishers, Inc. (hereinafter referred to as the "Employer") filed an unfair labor practice charge against the Petitioner, Chicago Typographical Union No. 16 (hereinafter referred to as the "Union"). Pursuant to the aforesaid charge, Respondent, the National Labor Relations Board (hereinafter referred to as the "Board"), found the Union violated Section 8(b)(1)(B) of the Labor-Management Relations Act (hereinafter referred to as the "Act") by disciplining two of its supervisor members who crossed its picket line during a strike to perform substantially only supervisory functions, including the adjustment of grievances.

The Union struck[1] the Employer in support of the Union's demands at the bargaining table. In the course of that dispute, the Union disciplined two supervisor members[2] for crossing the Union picket line and working during the strike, performing substantially only their supervisory duties. Thereafter the Union put in motion procedures resulting in the fining and expulsion from Union membership of the two supervisors.

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1. Petitioner misrepresented the work stoppage as a "lockout" (Pet. 4). The Board found the Union was engaged in a strike (Pet. App. A25).

2. At all times material, as both the Board and Administrative Law Judge found, both individuals were supervisors within the meaning of Section 2(11) of the Act and representatives for grievance adjustment within the meaning of Section 8(b)(1)(B) of the Act (Pet. App. A5-6, A15, A25).

The Administrative Law Judge recommended that the Complaint against the Union be dismissed because its motivation in imposing the discipline was to require the two supervisor members, along with its rank-and-file employee members, to withhold any and all work during the work stoppage.

The Board (Member Fanning dissenting) overruled the findings of its Administrative Law Judge and found that the Union violated Section 8(b)(1)(B) of the Act by disciplining the two supervisor members who crossed its picket line to perform substantially only supervisory functions, concluding that the reasonable effect of the discipline would be to adversely affect the supervisors' activities as Section 8(b)(1)(B) representatives. In reaching the conclusion the Board noted that the work being performed in fact during all times relevant herein by the two supervisors was principally or only supervisory functions (including grievance adjusting); there was no basis in fact for the Union's imposition of discipline other than the supervisors working behind a picket line; there was no evidence in the record to support the proposition that the Union could have reasonably believed that either supervisor was in fact performing rank-and-file struck work.

The Court of Appeals for the District of Columbia Circuit affirmed the decision of the Board and, thereafter, denied Petitioner's request for a rehearing.

ARGUMENTS AGAINST GRANTING WRIT.

I.

A Finding That a Union Violates Section 8(b)(1)(B) of the Act by Disciplining Supervisor Members Who Cross Its Picket Line to Perform Substantially Only Supervisory Functions Is Consistent with and Mandated by the Decision in Florida Power & Light Co.

Accepting Petitioner's contention that the central issue raised by its Petition is the scope and meaning of this Court's decision in *Florida Power & Light Co.* v. *International Brotherhood of*

Electrical Workers, 417 U. S. 790 (1974), it is clear that the Board and the Court of Appeals disposed of the instant case in a manner not merely consistent with but in a manner fully supported by that decision.

In *Florida Power & Light Co.*, this Court held that a union does not violate Section 8(b)(1)(B) of the Act by disciplining supervisor members for performing rank-and-file work during a strike. This Court made it clear, however, that there is a definite cleavage between supervisory work and rank-and-file work, stating:

> The question to be decided is whether the unions committed unfair labor practices under § 8(b)(1)(B) when they disciplined their supervisor-members for crossing the picket lines and *performing rank-and-file struck work* during lawful economic strikes against the companies. (Emphasis added.) 417 U. S. at 792.

The basis of this Court's decision was made even clearer when it stated:

> The conclusion is thus inescapable that a union's discipline of one of its members who is a supervisory employee can constitute a violation of § 8(b)(1)(B) only when that discipline may adversely affect the supervisor's conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer. 417 U. S. at 804-805.

The instant case, of course, does not involve the fining of supervisor members for crossing a picket line and performing rank-and-file work. It involves the fining of supervisory personnel for crossing a picket line to perform their supervisory functions.

It is apparent that *Florida Power & Light Co.* did not disturb the substantial body of law prohibiting a union from disciplining supervisor members for performing supervisory or management functions. To fully appreciate this fact, a brief review of the decision of the Board in *San Francisco-Oakland Mailers' Union*

No. 18, 172 NLRB 2173 (1968), and that of the U. S. Court of Appeals for the District of Columbia in *Meat Cutters Union Local 81* v. *NLRB*, 458 F. 2d 794 (1972), is necessary.

In *Oakland Mailers*, *supra*, three supervisor members were fined and expelled from the union for allegedly assigning work in violation of the contract. Despite the absence of direct pressure or coercion by the Union directed at securing the removal or replacement of the supervisors, the Board held that the union violated Section 8(b)(1)(B) because it was obvious that the effect of the union's conduct was to influence the manner in which the supervisors interpreted their contractual powers to assign work in the future. The Board considered it irrelevant that the union sought the substitution of attitudes instead of persons, observing: "Realistically, the Employer would have to replace its foremen or face *de facto* nonrepresentation by them." 172 NLRB at 2173.

In *Meat Cutters Union Local 81* v. *NLRB*, *supra*, the court affirmed the Board's decision that a union which fined a supervisor member because he carried out his employer's orders to procure certain meat products in prepared form in defiance of a union directive to the contrary violated Section 8(b)(1)(B) and stated:

> The Union in the instant case fined and expelled Supervisor Hall in retaliation for his performance of duties indigenous to his position as a management representative.[12] 458 F. 2d at 798.

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12. . . . The rule here applied by the Board only affects union discipline which is imposed upon a member, who has responsibilities as a representative of his employer in administering the collective bargaining agreement or the adjustment of employee grievances, *because he has performed duties as a management representative*. 458 F. 2d at 798-799 n. 12. (Emphasis added.)

This, of course, is precisely what occurred in this case. Here both supervisors were disciplined because they crossed the Union's picket line to perform their duties as management repre-

sentatives. How after all could they perform such duties if they did not cross the picket line?

In ruling in *Florida Power & Light Co.* that a union does not violate Section 8(b)(1)(B) by disciplining supervisor members for performing rank-and-file work during a strike, this Court did not hold that such cases as *Oakland Mailers* or *Meat Cutters* were decided wrongly. *Florida Power & Light Co.* v. *International Brotherhood of Electrical Workers*, 417 U. S. at 801-803. To the contrary, this Court agreed with the U. S. Court of Appeals for the District of Columbia view that:

> Section 8(b)(1)(B), the [District of Columbia Appeals] court held, was intended to proscribe only union efforts to discipline supervisors for their actions in representing management in collective bargaining and the adjustment of grievances. It was the court's views that *when a supervisor forsakes his supervisory role to do work normally performed by nonsupervisory employees, he no longer acts as a managerial representative and hence "no longer merits any immunity from discipline." Florida Power*, 417 U. S. at 797. (Emphasis added.)

This Court also stated:

> *We agree with the Court of Appeals* [for the District of Columbia] *that Section 8(b)(1)(B) cannot be so broadly read*. 417 U. S. at 803. (Emphasis added.)

This Court also noted that it could "assume without deciding that the Board's *Oakland Mailers'* decision fell within the outer limits of [*Florida Power & Light Co.*]." 417 U. S. at 804.

Finally, Mr. Justice White, joined in his dissenting opinion by the Chief Justice, Mr. Justice Blackmun and Mr. Justice Rehnquist, stated:

> I do not read the Court to say that § 8(b)(1)(B) would allow a union to discipline supervisor-members for performing supervisory or management functions, as opposed to customary rank-and-file work during a labor dispute. 417 U. S. at 815, n. 2.

In short, this Court held that union discipline of a supervisor member violates Section 8(b)(1)(B) if it may adversely affect the supervisor's conduct in performing his 8(b)(1)(B) functions, but found no such adverse effect where supervisor members were disciplined for performing rank-and-file struck work. While not presented with the issue, this Court also made it clear, especially by its approval of the *Oakland Mailers'* decision, that the disciplining of a supervisor member for crossing a picket line to perform his supervisory duties would have such an adverse effect. Thus, it is clear that the decision of the Board and Court of Appeals in the instant case is consistent with and supported by the *Florida Power & Light Co.* decision.

Petitioner states that the Board's decision in this case runs directly counter to the decision in *NLRB* v. *San Francisco Typographical Union, Local 21*, 486 F. 2d 1347 (9th Cir. 1973). In *San Francisco Typographical Union, supra*, the Court held that "Section 8(b)(1)(B) does not prevent unions from fining supervisors who perform rank-and-file work behind a picket line." 486 F. 2d at 1350. The Court also held, however, that the union violated Section 8(b)(1)(B) when it disciplined a supervisor member for performing his supervisory duties (discharging an employee violating company rules). 486 F. 2d at 1349. Hence, Petitioner's reliance is misplaced, for the holding is consistent with its analysis set forth above and actually supports the Court of Appeals' and Board's decisions.

Finally, the recent decision in *American Broadcasting Companies, Inc.* v. *NLRB*, ____ F. 2d ____, 93 LRRM 2958 (2d Cir. 1976) (reported after the filing of Petitioner's Petition for a Writ of Certiorari), affords no basis for a review of the instant decision. There in a *per curiam* opinion, the rationale of which is unexplicated, the Court denied enforcement of a Board Decision and Order finding that a labor organization violated Section 8(b)(1)(B) when it fined and otherwise disciplined certain supervisor members for crossing a picket line to perform their normal work. Judge Moore dissented and would have granted

enforcement based upon the analysis of *Florida Power & Light Co.* set forth in the instant brief.

It is the Intervenor's position that *American Broadcasting Companies, Inc.*, is simply and obviously wrong. The fact that a contrary and erroneous holding was made in that case does not offer the slightest reason for a review of the instant case, which is clearly consistent with this Court's decision in *Florida Power & Light Co.*

In short, the decision of the Board enforced by the D. C. Circuit that Petitioner violated Section 8(b)(1)(B) of the Act by disciplining supervisor members for crossing a picket line to perform supervisory functions, including grievance adjustment, is both consistent with and mandated by the decision in *Florida Power & Light Co.* v. *International Brotherhood of Electrical Workers, supra.*

II.

The Instant Decision Raises No Question Concerning the Extent of Limitation of the Constitutional Right of Free Assembly by the Taft-Hartley Amendments.

Petitioner suggests that the Board's Decision and Order in the instant case represent an unconstitutional interpretation and application of the Labor-Management Relations Act. Authority for this proposition is purportedly derived from *NLRB* v. *News Syndicate Co.*, 365 U. S. 695 (1961); *NLRB* v. *Edward G. Budd Manufacturing Co.*, 169 F. 2d 571 (6th Cir. 1948); *cert. denied*, 335 U. S. 908 (1949); and *Beasley* v. *Food Fair of North Carolina, Inc.*, 416 U. S. 653 (1974). These cases neither stand for nor lend support to Petitioner's proposition.

The relevance of these three cases to the instant case is the fact, undisputed herein, that:

> [W]hile supervisors are permitted to become union members, Congress sought to assure the employer of the loyalty of his supervisors by reserving in him the right to refuse to hire union members as supervisors [and] [citations

> omitted] the right to discharge such supervisors because of their involvement in union activities or union membership .... *Florida Power*, 417 U. S. at 808, 94 S. Ct. at 2746, citing *NLRB* v. *Edward G. Budd Mfg. Co., supra*, and *Beasley* v. *Food Fair of North Carolina, Inc., supra*.

None of these cases suggest, however, that because the employer permits supervisors to retain union membership that they are subject to union discipline for *every* action they take which their union construes as contrary to its interest.

In short, Petitioner has not shown what evidence in the record gives rise to its unfounded assertion that "constitutional rights of free speech and assembly" will be interfered with if the instant decision is allowed to stand, nor has it cited any pertinent legal authority in support of its position.

CONCLUSION.

For the above reasons, the writ of certiorari should not be granted.

Respectfully submitted,

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